MOHD AZMI ROBERT ABDULLAH v. PP

COURT OF APPEAL, KUCHING
BALIA YUSOF WAHI JCA
ABDUL AZIZ ABDUL RAHIM JCA
ABANG ISKANDAR JCA
[CRIMINAL APPEAL NO: Q-05-226-09-2013]
8 DECEMBER 2015

CRIMINAL LAW: *Murder – Appeal – Whether factum of shooting and that accused was shooter established – Whether deceased died from gunshot wound – Whether accused had mens rea to commit murder – Whether trial judge judicially considered evidence of burnt mark on palm of deceased – Whether indicated defence wound – Whether there was intention to cause such bodily injury as was likely to cause death – Whether falling under exceptions to murder – Whether guilty of culpable homicide not amounting to murder under s. 304(a) of Penal Code*

The appellant was charged with an offence of murder under s. 302 of the Penal Code. The brief facts of the case was that the appellant had gone to the hut of the deceased to ask for diesel, whilst carrying a shotgun with him. PW6, who had accompanied the appellant to the hut of the deceased, testified that upon seeing that the deceased was angry when asked for diesel, PW6 ran to the back of the hut. Whilst at the back of the hut, he heard a commotion followed by a sound of a gunshot. The appellant then called PW6 and they fled the place on a motorcycle. The trial judge, in convicting and sentencing the appellant to death by hanging, found that the appellant's version was not only incapable of belief, but had not raised any reasonable doubt on the prosecution's case. Hence, the appeal by the appellant. The only ground raised by the appellant in his appeal was that the trial judge had erred in concluding that the appellant had the necessary *mens rea* to commit murder under s. 302 of the Penal Code. It was argued that there was no evidence, direct or otherwise, to prove such *mens rea* conclusively that the appellant had intentionally shot and killed the deceased.

Held (convicting appellant for offence of culpable homicide not amounting to murder and sentencing him to 18 years of imprisonment; setting aside conviction for murder and sentence by High Court)
Per Abang Iskandar JCA delivering the judgment of the court:

(1) While motive may be helpful in the scheme of things in assisting the trial court in coming to its decision at the end of the whole case, motive is immaterial so far as the offence was concerned. Only intention or knowledge is relevant and needed to be proved by the prosecutor. The absence of motive may not be necessarily fatal to the prosecution's case. (para 14)

(2) The *factum* of shooting and that the appellant was the shooter had been clearly established from the evidence. It was also an undisputed *factum* that the deceased died as a result of the gunshot wound. However, the trial judge had not given sufficient judicial appreciation on the significance of the burnt mark on the palm of the left hand of the deceased. There was a commotion between the appellant and the deceased before the shot was fired, as testified by PW6. Hence, the burnt mark was indicative of the fact that there was close proximity between the appellant and the deceased and was also indicative of a struggle. The burnt mark was therefore a defence wound suffered by the deceased when trying to fend off the gun when it was fired. (paras 15, 19 & 22)

(3) The ballistic examination on the gun seized from the appellant showed that it was a 12-gauge cartridge that was discharged, which meant that once discharged the cartridge would spray out 12 pellets. Based on the evidence, only one pellet had hit the deceased and the wound caused therefrom had attributed to the death of the deceased. If the appellant had intended to kill the deceased, he could have taken aim at the body of the deceased and the 12 pellets would have found easy target from a distance. The fact that the gun was loaded was proof that the appellant was all ready to use the gun at his disposal. Hence, there was intention to cause such bodily injury as was likely to cause death, a circumstance for which s. 304(a) of the Penal Code was legislated, *ie*, to provide a punishment for an offence of unlawfully causing death of a person in a manner as described thereunder. (paras 19, 20 & 25)

(4) Based on the totality of the evidence, the situation as envisaged under Exception 4 to s. 300 of the Penal Code was established in that there was a sudden fight in the sense that there was an argument between the appellant and the deceased. Although the element of intention was present, it was an intention under one of the exceptions to murder under the Penal Code. As such, this was a fit and proper case for the court to invoke its appellate power to put right a miscarriage of justice that had occasioned to the appellant. The appellant's conviction for murder and the sentence imposed by the trial judge was therefore set aside. The appellant was instead convicted for an offence of culpable homicide not amounting to murder under s. 304(a) of the Penal Code and sentenced to 18 years of imprisonment. (paras 23, 31, 32, 34 & 35)

Bahasa Malaysia *Headnotes*

Perayu didakwa dengan kesalahan membunuh di bawah s. 302 Kanun Keseksaan. Fakta ringkas kes ialah perayu telah pergi ke pondok si mati untuk meminta diesel dengan membawa selaras senapang patah bersamanya. PW6, yang menemani perayu ke pondok si mati memberi keterangan bahawa apabila dia melihat si mati marah ketika diminta diesel, PW6 melarikan diri ke belakang pondok. Sementara berada di belakang pondok dia mendengar kekecohan diikuti dengan bunyi tembakan. Perayu kemudian memanggil

PW6 dan mereka melarikan diri dari tempat itu dengan motosikal. Hakim bicara, dalam mensabitkan kesalahan dan menjatuhkan hukuman gantung sampai mati ke atas perayu, mendapati bahawa versi perayu bukan sahaja tidak boleh dipercayai malahan tidak menimbulkan sebarang keraguan munasabah terhadap kes pendakwaan. Oleh itu, rayuan perayu. Satu-satunya alasan yang dibangkitkan oleh perayu dalam rayuannya adalah bahawa hakim bicara terkhilaf dalam menyimpulkan bahawa perayu mempunyai *mens rea* untuk melakukan pembunuhan di bawah s. 302 Kanun Keseksaan. Dihujahkan bahawa tidak ada keterangan, secara langsung atau sebaliknya, untuk membuktikan *mens rea* tersebut secara muktamad dan mendapati perayu dengan sengaja menembak dan membunuh si mati.

Diputuskan (mensabitkan perayu dengan kesalahan homisid salah tidak terjumlah kepada pembunuhan dan menjatuhkan hukuman 18 tahun penjara; mengetepikan pertuduhan membunuh dan hukuman oleh Mahkamah Tinggi)

Oleh Abang Iskandar HMR menyampaikan penghakiman mahkamah:

(1) Walaupun motif boleh pada kebiasaannya membantu mahkamah perbicaraan ketika membuat keputusan di akhir keseluruhan kes, motif bagi kesalahan adalah tidak material. Hanya niat dan pengetahuan relevan dan perlu dibuktikan oleh pihak pendakwaan. Ketiadaan motif tidak semestinya memudaratkan kes pendakwaan.

(2) Fakta tembakan dan bahawa perayu merupakan penembak dengan jelas dibuktikan berdasarkan keterangan. Adalah fakta yang tidak boleh dinafikan bahawa si mati meninggal dunia akibat luka tembakan. Walau bagaimanapun hakim bicara tidak memberi pertimbangan secara kehakiman yang mencukupi terhadap kepentingan tanda bakaran pada telapak tangan kiri si mati. Terdapat kekecohan antara perayu dan si mati sebelum tembakan dilepaskan sepertimana keterangan PW6. Oleh itu, tanda bakaran menunjukkan fakta bahawa terdapat jarak yang dekat antara perayu dan si mati dan juga menandakan pergaduhan tercetus. Justeru, tanda bakaran adalah luka pertahanan yang dialami oleh si mati apabila cuba menangkis senjata semasa tembakan dilepaskan.

(3) Ujian balistik terhadap senjata yang dirampas daripada perayu menunjukkan bahawa ia adalah katrij 12-tolok yang bermakna apabila dilepaskan katrij akan menyembur keluar 12 pelet. Berdasarkan keterangan hanya satu pelet terkena si mati dan luka tersebut menyebabkan kematian si mati. Jika perayu berniat membunuh si mati, dia boleh menghalakan pada badan si mati dan 12 pelet akan menepati sasaran dari jarak jauh. Fakta bahawa senjata tersebut diisi peluru adalah bukti bahawa perayu bersiap sedia untuk menggunakan senjata tersebut pada bila-bila masa. Oleh itu, terdapat niat untuk mengakibatkan kecederaan tubuh badan yang mungkin menyebabkan kematian, suatu keadaan untuk penggubalan s. 304(a) Kanun Keseksaan, iaitu untuk memperuntukkan hukuman bagi kesalahan menyebabkan kematian seseorang secara salah melalui cara sebagaimana yang digambarkan.

(4) Berdasarkan keseluruhan keterangan yang dikemukakan, situasi seperti yang digambarkan di bawah Pengecualian 4 s. 300 Kanun Keseksaan telah dibuktikan iaitu terdapat pergaduhan secara tiba-tiba di mana terdapat pertengkaran antara perayu dan si mati. Walaupun elemen niat wujud, ia adalah niat di bawah satu daripada pengecualian-pengecualian untuk membunuh di bawah Kanun Keseksaan. Oleh itu, ini adalah kes yang layak dan sesuai bagi mahkamah menggunakan kuasa rayuannya untuk memperbetulkan ketidakadilan yang berlaku kepada perayu. Sabitan perayu terhadap pembunuhan dan hukuman yang dikenakan oleh hakim bicara dengan itu diketepikan. Perayu sebaliknya disabitkan dengan kesalahan homisid salah tidak terjumlah kepada pembunuhan di bawah s. 304(a) Kanun Keseksaan dan dijatuhkan hukuman 18 tahun penjara.

Case(s) referred to:
PP v. Ma'arif [1969] 1 LNS 134 HC ***(refd)***
Sia Soon Suan v. PP [1965] 1 LNS 165 FC ***(foll)***
Tham Kai Yau & Ors v. PP [1976] 1 LNS 159 FC ***(refd)***

Legislation referred to:
Penal Code, ss. 80, 299, 300, 302, 304(a), (b), 304A

Penal Code 1860 [Ind], s. 300

Other source(s) referred to:
Ratanlal and Dhirajlal, '*The Indian Penal Code*', pp 1150, 1151

For the appellant - Orlando Chua; M/s Wong, Orlando Chua & Kuok
For the respondent - Robert Pasang Alam; DPP

[Editor's note: For the High Court judgment, please see PP v. Mohd Azmi Robert Abdullah [2013] 1 LNS 1136 (overruled)]

Reported by S Barathi

JUDGMENT

Abang Iskandar JCA:

Introduction

[1] Mohd Azmi Robert bin Abdullah ("the appellant") was charged with murder under s. 302 of the Penal Code ("PC"). He was convicted and sentenced by the learned High Court Judge sitting in Sibu for the said offence. Dissatisfied with the decision against him, the appellant had since appealed against that decision before us.

The Charge

[2] The appellant was initially charged, as follows:

Original Charge:

Bahawa kamu, pada 24.10.2011 jam lebih kurang 11.00 malam, bertempat di Pondok dalam kawasan Kem Bintani Maju Sdn. Bhd, Batu 69, Jalan Sibu/Bintulu, Ulu Balingian, di dalam daerah Mukah, dalam Negeri

Sarawak, telah membunuh YUDAS TADIAMPANG (NO. PASPOT: S 510241) dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[3] That charge was subsequently amended to read as follows:

Amended Charge:

That you on 24th day of October 2011, at about 11.00 p.m., at a hut in the area of Kem Pembalakkan Batu 69, Jalan Sibu/Bintulu, Ulu Balingian, in the district of Mukah, in the State of Sarawak committed murder by causing the death of YUDAS TADIAMPANG (PASPORT No. S 510241) and that you thereby committed an offence punishable under section 302 of the Penal Code.

The Prosecution's Case

[4] On 24 October 2011, at about 6pm, Bujang ak Liau (PW6), a worker at the timber camp, joined the appellant, his wife Linda, his brother Nyengang (PW7) and Apai Kilin for a drinking session of 'cap apek'. PW6 knew the appellant a week prior to this, as the appellant always came to his hut when visiting his relatives who stayed not far from his hut.

[5] During the drinking session, the appellant asked for diesel and requested PW6 to go with him to get the diesel. PW6 refused and went to his room, but the appellant persisted and brought him to Pok's hut. Pok was an Indonesian and his hut was a five minutes walk from PW6's hut. PW6 and the appellant went to Pok's hut on a motorcycle ridden by the appellant with PW6 riding as a pillion rider. The appellant brought along with him a shotgun.

[6] Upon reaching Pok's hut, the appellant knocked on the door and asked for diesel. When the appellant asked for diesel, Pok was angry and his face turned red. On seeing this, PW6 was scared and he ran to the back of the hut which was about ten metres away. Whilst at the back of the hut, he heard a commotion and the voice of the appellant saying very loudly "minta diesel Pok". He then heard the sound of a gunshot. The appellant then called him and asked him to run away together on the motorcycle. They went back to PW6's hut with PW6 riding the motorcycle and the appellant riding as pillion and holding the shotgun.

[7] When they reached the hut, Apai Kilin, Nyengang, the appellant's wife and another couple, whose name he did not remember, were at the hut. In the hut, the appellant told everyone present that the Indonesian man had died, shot by him. Later that night, the appellant and his wife fled bringing with him the shotgun.

[8] At around 2.15am, on 25 October 2011, Cpl Basir bin Selamat (PW1) received a report from Nunung Ardianto Yahaya saying that he was in the hut where he and Yudas (the deceased) were resting when somebody came on a motorcycle, knocking on their door and had asked for diesel. The

deceased went to open the door and after a while Nunung heard a gunshot. The deceased was identified as 'Pok'. He went to check and saw the deceased lying down in front of the door with a bloodied head. He then ran away to hide.

[9] Upon receiving the information, Inspector Jaidee bin Kasmin @ Vepin (PW14), went to the crime scene with his team and arrived at around 5.10am. They found the deceased's body and an expended cartridge at the scene. The next day, 26 October 2011, PW14 went to Nanang Long's house with a police team where they arrested the appellant at his house at Room No. 3. At the time of the arrest, they also seized a shotgun from the appellant.

[10] The appellant was charged as per abovementioned charge in Sibu High Court for the murder of Pok. On 23 August 2015, after a full trial, the learned High Court Judge had found the appellant guilty and sentenced him to death by hanging. Aggrieved by such decision, the appellant had since appealed against that decision before us.

The Appeal

[11] We heard oral submissions from learned counsel and the learned Deputy Public Prosecutor ("DPP") on 9 December 2014. We took some time to deliberate and we delivered our decision the next day, on 10 December 2014.

[12] Though a number of grounds were raised in the petition of appeal by the appellant, Mr Orlando Chua, learned counsel had indicated to us that he would only be pursuing the issue pertaining to the necessary *mens rea* in order to attach criminality for the murder charge against his client to stand. Indeed, as was stated clearly in his written submission, Mr Chua had drawn our attention to that part of his submissions at p. 3 therein: "Respectfully, the only pertinent issue in this appeal has been encapsulated in Ground (6) of the PoA:

> That the learned HCJ had thus erred in concluding that the Appellant had the necessary *mens rea* to commit murder under section 302 Penal Code when there was no evidence, direct or otherwise to prove conclusively the same and had gone on a volition of her own to find that the Appellant had intentionally shot and killed the said deceased.

[13] It was articulated by learned counsel that the impugned part of the decision in establishing the foundation for the learned trial judge to conclude that there was a motive on the part of the appellant to kill the deceased had appeared at p. 157 of the appeal records:

> PW4's evidence that the accused had asked for diesel from him on 2 occasions in an unfriendly and angry manner prior to the killing was credible and was largely unchallenged. In particular his evidence that on the last occasion at about 6.30 pm on 24.10.2011 the accused on being refused diesel had angrily said that he was coming back was unchallenged. PW4's evidence pinned a motive on the accused for the killing.

[14] We pause to make an observation that while motive maybe helpful in the scheme of things in assisting the trial court in coming to its decision at the end of the whole case, motive is immaterial so far as the offence was concerned. If there was evidence of motive, well and good. But if there be none, it will not be fatal to the prosecution's case, on account of a mere failure on the part of the prosecution to adduce the evidence of motive. As is clearly stated by the learned authors of '*The Indian Penal Code*', Ratanlal and Dhirajlal, "The mental element in culpable homicide, ie, the mental attitude of the agent towards the consequences of his conduct, is one of intention or knowledge. Motive is immaterial so far as the offence is concerned, and need not be established." (See, p. 1150 therein (*supra*)). The distinction may be fine, but it is real. Only intention or knowledge is relevant and needed to be proved by the prosecutor. While presence of evidence on motive may be helpful, its absence may not be necessarily fatal to the prosecution's case.

[15] From a perusal of the evidence led by the prosecution, what had happened immediately before the fatal shooting took place was adduced by PW6 who was the last person in close proximity with the appellant and the deceased at that material time. He was nearby, however he did not really see the commotion between the appellant and the deceased. What he did testify in the trial was that he heard a gunshot being fired. But he did not witness the actual firing and therefore was not able to relate as to the manner how that gunshot was fired. That part of the prosecution's evidence was clear for all to see. What was also clear from the evidence was that the *factum* of shooting was undisputed and that the appellant was the shooter. The *factum* that the deceased died as a result of the gunshot wound was also beyond any dispute. The only question that needed to be addressed and be given an answer to was whether, when the appellant caused the death of the deceased on that fateful day, he did it with malice aforethought. What is clear is that merely causing death to a person does not necessarily render the killer liable to be charged for murder. More specifically, in legal language, in the context of the Penal Code, the pertinent question is whether he had caused the death of the deceased in circumstances that would bring his *actus reus* and *mens rea* within the ambit of s. 300 therein.

[16] What s. 300 of the Penal Code contemplates has been extensively deliberated both by esteemed and authoritative authors on criminal law as well as from court's decisions, both local and abroad from like jurisdictions where the statutory provisions are in *pari materia* with ours. A short revisit to the authoritative work of Ratanlal and Dhirajlal entitled, "*The Indian Penal Code*", 29th edn has produced the following elucidation on s. 300 of the Indian Penal Code (which is in *pari materia* with our own Penal Code) at p. 1150:

> In this section the definition of culpable homicide appears in an expanded form each of the four clauses requires that the act which causes death should be done intentionally, or with the knowledge or means of knowing

A that death is a natural consequence of the act. An intention to kill is not always necessary to make out the case of murder. A knowledge that the natural and probable consequence of an act would be death will suffice for a conviction under s. 302 IPC.

[17] Before us, Mr Robert Pasang, learned DPP had submitted that the B approach that was undertaken by the learned trial judge was unassailable in that she had considered in detail, the two versions that were presented before her by both parties and that at the end of the day, she had not been impressed by the appellant's version of the event. Indeed, she had found the appellant's version not only incapable of belief, but that it had not raised a reasonable C doubt in the prosecution's case. On account of that finding, the learned trial judge had convicted and sentenced the appellant for the offence of murder. It was therefore his submissions before us that we ought not to disturb the decision of the learned trial judge and that it ought to be affirmed.

[18] It was argued by learned counsel, Mr Chua, that in disbelieving the D appellant's version of event, the learned trial judge had failed to sufficiently address her mind to the defence of accident that was raised by the appellant. At the end of submissions, learned counsel had urged this court to acquit the appellant as there was no evidence of *mens rea* to convict on the charge of murder, and that at highest, the evidence adduced could only justify a E conviction under s. 304A of the Penal Code for causing death as a result of a rash or negligent act by the appellant under the circumstances. In other words, it all had boiled down to the question of determining the kind of intention that had actuated the act of the appellant when he pulled the trigger of his shotgun that had resulted in the death of the deceased.

F **[19]** We had considered the submissions of parties on the issue of *mens rea*. With respect, we would agree with learned counsel for the appellant in that the learned trial judge had failed to address her mind sufficiently on the evidence of the burnt mark on the palm of the deceased's left hand. She had not given sufficient judicial appreciation on the significance of the burnt mark G in the light of the evidence of the chemist which had confirmed that on ballistic examination on the gun that was seized from the appellant, it was a 12-gauge cartridge that was discharged. The pathologist had testified that the wound caused therefrom had attributed to the death of Pok, the deceased.

[20] Bearing in mind that it was 12-gauge cartridge, it would mean that H once discharged, the cartridge would spray out 12 pellets. Then, there was the evidence of the pathologist which stated that only one pellet had hit the deceased on the left side of his face, which went through his left eye and ended up embedded, as it were, in the brain of the deceased. We agreed with learned counsel that there is great significance in the interplay between the I evidence of the chemist and the finding of the pathologist that could impact on the issue of *mens rea*. Mr Chua said that it had been an accident, and as such, the *actus reus*, namely the act of firing the gun was devoid of any malintention, and was therefore excused by law. His take on the burnt mark

on the deceased's palm was caused by the deceased trying to disarm the appellant and had suffered the burnt, when the gun was fired while the deceased was holding the barrel of the gun. It was his further submissions before us that during the struggle between them, the appellant had accidently pulled the trigger thus firing the gun thereby causing the fatal injury onto the deceased.

[21] We had considered the evidence in its totality. Upon proper appreciation of the evidence, since an appeal is essentially a rehearing (See *PP v. Ma'arif* [1969] 1 LNS 134; [1969] 2 MLJ 65) we were of the view that there was sufficient evidence to convict the appellant for the offence of culpable homicide not amounting to murder and offence punishable under s. 304(a) or (b) of the Penal Code which read as follows:

> Whoever commits culpable homicide not amounting to murder shall be punished:
>
> (a) with imprisonment for a term which may extend to thirty years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;
>
> (b) with imprisonment for a term which may extend to ten years or with fine or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

[22] On the evidence, the fact that there was a commotion between the appellant and the deceased before the shot was fired as testified by PW6 was not disputed. It must be recalled that there was no eyewitness testimony, beside the appellant himself, as to what had happened after PW6 had gone to the back portion of the deceased's hut after he had knocked on Pok's door. We found that this apparent gap was filled in by the learned trial judge by her acting on the purported admission made by the appellant to the people who were present after he and PW6 had come back after the incident, whereby the appellant had allegedly told those present that he had shot the deceased. It would appear to us that the learned trial judge had admitted the admission lock, stock and barrel and had read into it that he had intentionally killed the deceased. It was here, in our respectful view that the learned trial judge had failed to judicially factor in the burnt mark in the palm of the deceased's left hand. That burnt mark was indicative of the fact that there was close proximity between the appellant and the deceased, in point of space and time, when the gun was fired. Also, it was indicative of a struggle. This conclusion, we would reckon, had found support in the evidence of PW6 when he testified that he heard exchange of words but he was not able to determine and state for certain, who was the aggressor between the two men before he heard the gunshot was fired. It is worthy of note that there were no injuries found on the appellant as was candidly admitted by Mr Chua. The burnt mark was therefore a defensive wound suffered by the deceased when trying to fend off the gun when it was fired.

[23] Under the circumstances, we were of the respectful view that a situation that was envisaged under exception 4 to s. 300 of the Penal Code was in fact established through the totality of the evidence led before the court. Exception 4 to s. 300 of the Penal Code provides:

> Exception 4 - Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

[24] The explanation to that exception goes on to explain that "it is immaterial in such a case which party offers the provocation or commits the first assault".

[25] We agreed with Mr Chua that if the appellant had intended to kill the deceased, he could have taken aim at the body of the deceased and considering the cartridge was of 12-gauge type, the 12 pellets would have found easy target from a distance. Accepting that there was a commotion or struggle and a shot was fired, we were of the view that the fact that the gun was loaded was proof that the appellant was all ready to use the gun at his disposal. There was therefore intention to cause such bodily injury as is likely to cause death, a circumstance for which s. 304(a) of the Penal Code has been legislated to provide a punishment for an offence of unlawfully causing death of a person in a manner as described thereunder.

[26] In the upshot, with respect, we also agreed with Mr Chua's submissions that the learned trial judge had deprived the appellant of a fair evaluation of his defence when she failed to address the critical issue pertaining to the burnt mark on the deceased's left palm. It did impact significantly on the issue of *mens rea*. The contention put forth by Mr Chua was not entirely devoid of merit. But we were unable to accede to his submission that this case ought to be treated as an accident under s. 80 of the Penal Code or under s. 304A of the Penal Code, namely a rash or negligent act.

[27] Intention is something that can rarely be proven by direct evidence, unless of course, the accused person has admitted or confessed to his criminal conduct. Indeed, there was neither of that sort in this case before us. Intention is a subjective element which is not *ex-facie* present in any conduct. As such, the intention must therefore be inferred from the circumstances surrounding the impugned conduct attributable to the appellant.

[28] In the context of this case, we found the need to refer back the settled literature on the intention that need to be proven in order to amount to murder. To drive home the charge for murder under s. 300 of the Penal Code, intention is not the only criterion that could form the basis upon which an offence of murder can be constituted. Knowledge can also be the basis for the murder charge, as long the knowledge fulfils the dictates that are required under the respective clauses under s. 300 of the Penal Code.

[29] Reverting to '*The Indian Penal Code*' by Ratanlal and Dhirajlal (*supra*), the learned authors had stated at p. 1151 therein, as follows:

> It does not follow that a case of culpable homicide is murder, because it does not fall within any of the Exceptions to s. 300. To render culpable homicide murder the case must come within the provisions of Clause 1, 2, 3 or 4 of s. 300 and must not fall within any one of the five Exceptions attached thereto. An offence under Section 302, IPC presupposes an offence under Section 299, IPC. But an offence under Section 299, IPC becomes an offence under Section 302, IPC, if it is committed with the intention or knowledge described in the four clauses or either of the four clauses of Section 300, IPC. If the requisite intention or knowledge under the several clauses of Section 300, IPC is not proved, then the offence is one under Section 299, IPC provided, of course, the intention or the knowledge mentioned in Clauses (a) to (c) of that section are proved. So, when the act of an accused results in death of a human being, one is to consider at the first instance whether the act of the accused falls under any of the clauses of Section 300 IPC. The right approach in cases of culpable homicide is to first find out if the offence calls under any of the four clauses of Section 300, IPC. If it is so found the trial Judge is then to see if the case is covered by one of the exceptions to the section. The offence if proved to fall under one of the exceptions would be punishable under Section 304, Part I, otherwise it would be murder punishable by Section 302, IPC. If, on the other hand, the requirements of Section 300 are not fulfilled and the offence does not fall under any one of its four clauses, the Court should proceed to see whether it was committed with one of the intentions mentioned in Part I or only with the knowledge described in Part II to Section 304.

[30] The Federal Court case of *Tham Kai Yau & Ors v. PP* [1976] 1 LNS 159; [1977] 1 MLJ 174 had succinctly differentiated between these two offences of murder (s. 300) and culpable homicide not amounting to murder (s. 299) where learned Justice Raja Azlan Shah FCJ (as His Majesty then was) had said on behalf of the apex court:

> Whether the offence is culpable homicide or murder, depends upon the degree of risk to human life. If death is **likely** to result, it is culpable homicide. If it is the **most probable** result, it is murder. (emphasis added)

[31] We found that the element of intention was indeed present, but that it was an intention under one of the exceptions to murder under the Penal Code. There was sudden fight in the sense that there was an argument between the appellant and the deceased. PW6 became scared and ran away. It must have been quite an argument and it was sudden. There was a commotion. It came from the evidence of the prosecution's witness itself. It was an undisputed fact that the appellant had his finger on the trigger. That was a clear indication of his intent. But for the sudden fight, as was evidenced by the commotion as adduced by a prosecution witness, and the burnt mark sustained by the deceased, the proffered charge for murder would have stuck. We noted too that, only one of the 12 pellets had hit the deceased. Had the

A appellant really intended to murder the deceased, he could have shot him directly at his body. After all, they were so close to each other. Indeed, the deceased was holding on to the barrel of the gun when the shot was fired. As was said by the learned authors of '*The Penal Law of India*' by Dr Sir Hari Singh Gour, "s. 304 first limb (a) applies when the case falls under one of
B the other clauses of s. 300 but is covered by the exception to that section". That would mean where there is knowledge that the death will be the likely result, but intention to cause death or bodily injury likely to cause death is absent. (Thus, the exception to murder - here it is exception 4 to s. 300). Again, the degree of the risk of one pellet hitting the deceased would not have
C most probably caused death to the deceased. (See, the *Tham Kai Yau's* case (*supra*)).

[32] As such, this was a fit and proper case for us to invoke our appellate power in order to put right a miscarriage of justice that had been occasioned to the appellant when he was convicted for the offence of murder by the
D learned High Court Judge.

[33] The prosecution's evidence had established the *factum* that the appellant had caused the death of the deceased, Pok, on that fateful day. The only crucial issue was whether it was murder or culpable homicide not amounting to murder. We had looked at the objective evidence and in view
E of the authorities, we had concluded that it was culpable homicide not amounting to murder. We were guided as always by what was said in the case of *Sia Soon Suan v. PP* [1965] 1 LNS 165; [1966] 1 MLJ 116 (Federal Court) as per Justice Ong Hock Thye Ag CJ (Malaya):

> F … the requirements of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether the court is otherwise convinced in his own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else …

[34] Premised on the above considerations, we had set aside the conviction
G for murder and the sentence imposed by the learned trial judge against the appellant. And in its place, we had entered a conviction against him under s. 304(a) of the Penal Code, for an offence of culpable homicide not amounting to murder.

[35] After hearing both parties' submissions on sentence, and taking into
H consideration the appellant was a first offender, we had sentenced the appellant to imprisonment for a term of 18 years, with effect from 26 October 2011. We had therefore so ordered accordingly.

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